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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~826~~ 3

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 16, 1965
CERTIORARI GRANTED MARCH 21, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 826

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11267

(Title 18, U.S.C., Section 371)

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, and ARTHUR GJANCKI.

INDICTMENT—Filed October 6, 1964

The Grand Jury Charges:

Count One

That on divers dates between July 23, 1964 and October 6, 1964, at Bridgeport in the District of Connecticut, Frank Costello, James "Totto" Marchetti, and Arthur Gjancki, the defendants herein, did in violation of Title 18, United States Code, Section 371, conspire, confederate and agree with one another and with others to the Grand Jury unknown, to wilfully fail to pay to the District Director of Internal Revenue for the Internal Revenue District of Hartford, in violation of Title 26, United States Code, Section 7203, the special occupational tax of Fifty Dollars ($50.00) for the period ending June 30, 1965, imposed upon them by Title 26, United States Code, Section 4411, as persons engaged in the business of accepting wagers and receiving

wagers for or on behalf of a person liable for the said tax, and they committed the following overt acts, among others, in furtherance of and to effect the object of the conspiracy:

Overt Acts

1. On or about August 3, 1964, the defendant, James "Totto" Marchetti, did accept wagers at Bridgeport in the District of Connecticut.

2. On or about July 23, 1964, the defendant Arthur Gjancki, did accept wagers at Bridgeport in the District of Connecticut.

3. On or about October 2, 1964, the defendant, Frank Costello, did accept wagers at Bridgeport in the District of Connecticut.

4. On or about September 14, 1964, the defendants, James "Totto" Marchetti, Arthur Gjancki and Frank Costello, met at Bridgeport, Connecticut in the Lafayette Diner, [fol. 2] 963 Lafayette Street, Bridgeport in the District of Connecticut.

A True Bill

Adrian K. Lane, Foreman.

F. Owen Eagan, United States Attorney, Howard T. Owens, Jr., Assistant United States Attorney.

[File endorsement omitted]

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11269

(Title 26, U.S.C., Section 7203)

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

INDICTMENT—Filed October 6, 1964

The Grand Jury Charges:

Count One

Frank Costello, of Trumbull in the District of Connecticut, on or about October 2, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to pay the special occupational tax as required by 26 United States Code 4411, due and owing the United States of America for the year ending June 30, 1965, in violation of Title 26, United States Code, Section 7203.

Count Two

Frank Costello, of Trumbull in the District of Connecticut, on or about October 2, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to register as required by 26 United States Code 4412, in violation of Title 26, United States Code, Section 7203.

A True Bill

Adrian K. Lane, Foreman.

F. Owen Eagan, United States Attorney, Howard T. Owens, Jr., Assistant United States Attorney.

[fol. 4] [File endorsement omitted]

[fol. 4a]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,267

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO; JAMES MARCHETTI;
and ARTHUR GJANCI.

Criminal No. 11,270

UNITED STATES OF AMERICA,

v.

JAMES MARCHETTI.

MOTION OF DEFENDANT MARCHETTI IN ARREST OF JUDGMENTS AND TO DISMISS INDICTMENTS BASED UPON MATTERS WHICH SHALL BE NOTICED BY THE COURT AT ANY TIME DURING THE PENDENCY OF THE PROCEEDINGS—Filed January 6, 1965

* * * * * * *

1/11/65

Motion denied.

Wm. H. Timbers, Chief Judge.

[fol. 5] Part B.

1. Payment of the special occupational tax and the registration required by 26 U.S.C. §4411 and §4412, referred

to in the indictments, requires answering, *inter alia,* the following questions:

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

These questions are contained in U. S. Treasury Department—Internal Revenue Service Special Tax Return and Application for Registry—Wagering (Form 11-C), a copy of which is annexed to this Motion as Exhibit B. Pursuant [fol. 6] to 26 U.S.C. §6011 (a) every person required to make a return or statement shall include therein the information required by such form.

2. Payment of the special occupational tax pursuant to 26 U.S.C. §4411 would compel defendant Marchetti to be a witness against himself within the meaning of the constitutional privilege against self-incrimination.

3. Registration pursuant to 26 U.S.C. §4412 would compel defendant Marchetti to be a witness against himself within the meaning of the constitutional privilege against self-incrimination.

Wherefore, defendant Marchetti moves that in Criminal Nos. 11,267 and 11,270 the judgments be arrested and the indictments be dismissed on the grounds that this Court lacks jurisdiction and the indictments fail to allege an offense because the statutes involved are violative of the Fifth Amendment to the United States Constitution and because there can be no conspiracy to violate an unconstitutional statute.

* * * * * * *

[fol. 7] Francis J. King, 1115 Main Street, Bridgeport, Connecticut; Jacob D. Zeldes, 955 Main Street, Bridgeport, Connecticut, Attorneys for defendant James Marchetti.

FORM 11-C
Rev. Mar. 1958

U. S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from ..... to June 30, 19.....
(Month, day, and year)

1. Name: True name.....

Alias, style, or trade name, if any.....

2. Address: Residence.....
(Number and street)

.....
(City) (County) (State)

Business.....
(Number and street)

.....
(City) (County) (State)

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

.....

.....

.....

.....

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

For District Director's Use Only

.....
(Stamp number)

.....
(Date issued)

.....
(Registration number)

Tax..... $.....
Penalty..... $.....
Interest..... $.....
Total..... $

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No
(Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive wagers for or on behalf of some other person or persons? ☐ Yes ☐ No
(Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

....., 19..... ....
(Date) (Signature) (State whether individual owner, member of firm, or if corporation officer, give title)

[fol. 8]

EXHIBIT B TO MOTION OF DEFENDANT MARCHETTI

[fol. 9] Certificate of service (omitted in printing).

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11267

UNITED STATES,

v.

FRANK COSTELLO, et al.

Criminal No. 11269

UNITED STATES,

v.

FRANK COSTELLO.

MOTION OF DEFENDANT FRANK COSTELLO IN ARREST OF JUDGMENT—Filed January 9, 1965

The defendant Frank Costello moves the court pursuant to Federal Rules of Criminal Procedure 12(a)(2) and 34 to arrest judgment in the above entitled cases because:

1) Prosecution of defendant is barred because the statutes upon which the indictments are based are unconstitutional being in violation of the privilege against self

[File endorsement omitted]

1/11/65

Motion denied.

Wm. H. Timbers, Chief Judge.

incrimination clause of Fifth Amendment to the United States Constitution.

. . . . . .

[fol. 11] This defendant also incorporates and relies upon the brief filed by the defendant Marchetti in support of his motion in arrest of judgment in these cases, in support of the foregoing motion in arrest of judgment.

Dated at New Haven, Connecticut, this 8th day of January, 1965.

Respectfully submitted,

Philip R. Shiff, Adrian W. Maher, Attorneys for Defendant Frank Costello.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,267 Criminal

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

JUDGMENT AND COMMITMENT—January 11, 1965

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[File endorsement omitted]

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 18, Section 371 of the United States Code, (conspiracy to violate Title 26, Section 7203 of the United States Code,) as charged[3] in count number one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1) year. The defendant is required to pay a fine of Ten Thousand ($10,000) Dollars. This fine is to be a committed fine.

Execution of the sentence of imprisonment is stayed twenty-four hours.

~~It Is Adjudged that~~[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Wm. H. Timbers, United States District Judge.

The Court recommends commitment to:[6]

....., Clerk.

---

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number ..... " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11269 Criminal

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

JUDGMENT AND COMMITMENT—January 11, 1965

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 26, Section 7203 of the United States Code, (person engaged in the business of accepting and receiving wagers, failed to pay special occupational tax as required; and failed to register as required), as charged[3] in count numbers one and two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1) year on count number one. The defendant is required to pay a fine of $10,000 on count number one. This fine is to be a committed fine. The sentence of imprisonment and the fine in this case are to run concurrently with the sentence imposed in Criminal Case No. 11,267.

Imposition of sentence is suspended on count number two and the defendant is to be placed on probation for a period of two years from the date of release from prison.

~~It Is Adjudged that~~[5]

Execution of the sentence of imprisonment is stayed twenty-four hours.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Wm. H. Timbers, United States District Judge.

The Court recommends commitment to:[6]

....., Clerk.

---

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[File endorsement omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,267

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO, et al.

NOTICE OF APPEAL—Filed January 12, 1965

1. *Name and address of Appellant*:

Frank Costello, 16 Glenarden Road, Trumbull, Connecticut

2. *Name and address of Appellant's Attorneys*:

Adrian W. Maher, 955 Main St., Bridgeport, Connecticut
Philip R. Shiff, 129 Church St., New Haven, Connecticut

3. *Offense*:

18 U.S.C. Section 371.

4. *Concise Statement of Judgment or Order Giving Date and Any Sentence*:

January 11, 1965. Denial of defendant's motion for acquittal under Rule 29(b) and in the alternative for a new trial under Rule 33 of Federal Rules of Criminal Procedure; denial of defendant's motion in arrest of judgment and to dismiss indictment pursuant to Federal Rules of Criminal Procedure 34 and 12(a)(2); sentence of one year, $10,000.00 fine.

I, the above named appellant hereby appeal to the U. S. Court of Appeals for the Second Circuit from the above stated judgment.

Dated at New Haven, Connecticut, this 11th day of January, 1965.

Philip R. Shiff, 129 Church Street, New Haven, Conn.,
Attorney for Defendant Frank Costello.

Service (omitted in printing).

[File endorsement omitted]

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,269

UNITED STATES OF AMERICA

v.

FRANK COSTELLO

NOTICE OF APPEAL—Filed January 12, 1965

1. *Name and address of Appellant*:

Frank Costello, 16 Glenarden Road, Trumbull, Connecticut

2. *Name and address of Appellant's Attorneys*:

Adrian W. Maher, 955 Main Street, Bridgeport, Connecticut
Philip R. Shiff, 129 Church Street, New Haven, Connecticut

3. *Offense*:

26 U.S.C. Sections 7203, 4411, 4412 (two counts).

4. *Concise Statement of Judgment or Order Giving Date and Any Sentence*:

January 11, 1965. Denial of defendant's motion for acquittal under Rule 29(b) and in the alternative for a new trial under Rule 33 of Federal Rules of Criminal Procedure; denial of defendant's motion in arrest of judgment and to dismiss indictment pursuant to Federal Rules of Criminal Procedure 34 and 12(a)(2); sentence of one year, $10,000.00 fine (to run concurrently with sentence in Criminal No. 11,267).

I, the above named appellant hereby appeal to the U. S. Court of Appeals for the Second Circuit from the above stated judgment.

Dated at New Haven, Connecticut, this 11th day of January, 1965.

Philip R. Shiff, 129 Church Street, New Haven, Conn., Attorney for Defendant Frank Costello.

Service (omitted in printing).

[File endorsement omitted]

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA, Appellee,

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI, Appellants.

UNITED STATES OF AMERICA, Appellee,

—v.—

FRANK COSTELLO, Appellant.

UNITED STATES OF AMERICA, Appellee,

—v.—

JAMES "TOTTO" MARCHETTI, Appellant.

[fol. 17]

UNITED STATES OF AMERICA, Appellee,

—v.—

ARTHUR GJANCI, Appellant.

Before: Waterman, Friendly and Smith, Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, Chief Judge, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

Philip R. Shiff, New Haven, Conn. (Adrian W. Maher, on brief), for Appellant Frank Costello.

Jacob D. Zeldes, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), for Appellant Marchetti.

Carroll W. Brewster (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn., Kimberly B. Cheney, on brief), for Appellant Gjanci.

Jon O. Newman, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), for Appellee.

[fol. 18]

OPINION—October 29, 1965

Friendly, Circuit Judge:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26

U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the [fol. 19] Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime against [fol. 20] the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by

---

[1] Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only [fol. 21] by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both

Kahriger and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d [fol. 22] 577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger*, *supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release

mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and [fol. 23] that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest

[fol. 24] of judgment after the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that [fol. 25] other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953), there is a distinction [fol. 26] between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*,

§1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with [fol. 27] which he is to be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See

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[2] Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

[3] Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

United States v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and [fol. 28] arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once

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[4] The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato*, *supra*, 293 F. 2d at 378; *United States* v. *Smith*, 343 F. 2d 847 (6 Cir. 1965).

[5] We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

[fol. 29] Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context be-

low. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner,* 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if [fol. 30] he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States,* 377 U. S. 201 (1964), and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States,* 318 U. S. 332 (1943), and *Mallory* v. *United States,* 354 U. S. 449 (1957). The Government contends, *inter alia,* that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to pro-

tect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio*, —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, ARTHUR GJANCI, Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

JUDGMENT—October 29, 1965

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 31a] [File endorsement omitted]

[fol. 32]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

JUDGMENT—October 29, 1965

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 32a] [File endorsement omitted]

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, ARTHUR GJANCI, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JAMES "TOTTO" MARCHETTI, Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ARTHUR GJANCI, Defendant-Appellant.

ORDER DENYING REHEARING—November 26, 1965

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 33a] [File endorsement omitted]

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 826, October Term, 1965

FRANK COSTELLO, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to Question 1 presented by the petition which reads as follows:

"1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in Albertson vs. Subversive Activities Control Board, —— U.S. —— (1965), overrule United States vs. Kahriger, 345 U.S. 22 (1953) and Lewis vs. United States, 348 U.S. 419 (1955)?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.